



OHIO ETHICS COMMISSION

THE ATLAS BUILDING 1200
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

Advisory Opinion Number 87-006
August 14, 1987

Syllabus by the Commission:

Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of a county board of mental retardation and developmental disabilities, and the superintendent, an administrative official, or case manager employed by the board, from serving, or using the authority or influence of his public office or employment to secure a position, as trustee, officer, or employee of a residential service provider, regardless of whether the county board has contracted with the residential service provider.

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You asked whether the Ohio Ethics Law and related statutes prohibit a member of a county board of mental retardation and developmental disabilities (hereinafter county board) from serving as a member of the board of trustees or as an administrative official of a residential service provider. You have also asked whether the superintendent (the board's administrator), other administrative officials, or case managers employed by a county board of mental retardation and developmental disabilities may serve as a member of the board of trustees of a residential service provider. You have asked that the above questions be considered in situations where a contract exists between the county board of mental retardation and developmental disabilities and residential service provider, and where no contract exists between the two agencies.

Your questions will first be discussed in the situation where no contract exists between the county board and the residential service provider.

Divisions (D) and (E) of Section 102.03 of the Revised Code read as follows:

(D) No public official or employee shall use or authorize the use of the authority or influence of his office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

(E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

A "public official or employee" is defined for purposes of R.C. Chapter 102. to include any person who is appointed to an office or who is an employee of a county. See R.C. 102.01(B)

and (C). A board of mental retardation and developmental disabilities is a county board. See R.C. 5126.02. Further, a member of a county board of mental retardation and developmental disabilities is appointed to an office of the county. See R.C. 5126.02; Advisory Opinions No. 75-008 and 81-003. Therefore, members and employees of county boards of mental retardation and developmental disabilities are subject to the prohibitions of R.C. 102.03(D) and (E). See Ohio Ethics Commission Advisory Opinion No. 81-003.

The duties of a county board are set forth in Section 5126.05 of the Revised Code and include: (1) the assessment of facility and service needs of the mentally retarded and developmentally disabled residents of the county and of former residents who have been placed in residential facilities pursuant to R.C. 5123.18; (2) the planning and setting of priorities based on available funds for the provision of facilities and services to meet the needs of county residents with mental retardation or developmental disabilities and of former residents who have been placed in residential facilities pursuant to R.C. 5123.18; (3) the coordination, monitoring, and evaluation of existing services and facilities; (4) ensuring that residential services are available according to the plan and priorities developed by the board based on available funds; and (5) the requirement of individual habilitation plans for clients and eligible unserved clients. The board must also provide case management services, see R.C. 5126.05(M), including the monitoring of all residential placements in licensed facilities to ensure that clients are receiving all necessary and mandated services and are residing in the least restrictive environment. See Ohio Administrative Code Rule 5123:2-1-11.

R.C. 5123.04 further provides that a county board must, under rules adopted by the Department of Mental Retardation and Developmental Disabilities (hereinafter MRDD), receive and review all proposals for the development of residential services that are submitted to it, and must, if the proposals are acceptable to it, recommend to MRDD providers for the development of residential services within the county. MRDD then approves such proposals based upon the county boards' recommendations and the availability of funds. See Ohio Administrative Code Rule 5123:2-16-01.

As set forth above, R.C. 102.03(D) and (E) prohibit a county board member or employee from soliciting, accepting, or using the authority or influence of his office or employment to secure anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. In Advisory Opinion No. 86-007, the Ethics Commission concluded that a pecuniary or fiduciary interest in a private enterprise is within the definition of "anything of value," as used in R.C. 102.03. A trustee or officer of a nonprofit corporation holds a fiduciary interest in that corporation. See generally Advisory Opinion No. 87-003. Employment with an agency is also deemed to be "anything of value" for purposes of R.C. 102.03. See Advisory Opinions No. 77-003, 77-006, and 82-002. The Ethics Commission has also field that a public official or employee is prohibited from soliciting, accepting, or using his authority or influence to secure, anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the public agency with which the official or employee serves. See Advisory Opinions No. 80-004, 84-009, 86-008, and 86-011. Thus, a public official or employee is prohibited from soliciting, accepting, or using the authority or influence of his office or employment to secure a position as a trustee, officer, or employee of

an agency which is interested in matters before, regulated by, or doing or seeking to do business with, the public entity with which the official or employee serves.

The Ethics Commission has consistently held that public officials and employees are not prohibited by the Ohio Ethics Law from holding outside, private positions so long as no actual conflict of interest exists between the officials or employee's public and private positions. See Advisory Opinions No. 85-006 and 86-008. If, however, a public officials or employee's private position could impair his independence of judgment with regard to his official decisions and responsibilities, and thus, is of such a character as to manifest a substantial and improper influence upon him, the public official or employee is prohibited from holding such private position. See Advisory Opinions No. 84-009 and 85-006. See also Advisory Opinions No. 77-006, 86-007, and 86-008.

In this instance, it is clear that residential service providers are interested in matters before county boards of mental retardation and developmental disabilities. Residential service providers are interested in the plans and priorities set by county boards for the provision of various facilities and services, which include residential services, in the coordination, monitoring, and evaluation of existing residential services, and in the county board's provision of case management services, which includes the monitoring of residential placements to ensure that clients are receiving all necessary and mandated services, and are residing in the least restrictive environment. Residential service providers are also interested in the county board's review of plans for the development of residential services and its recommendation of providers for the services.

It is apparent from the statutes outlining the duties of a county board that a county board and residential service provider may often stand in adversarial positions. County boards must monitor and evaluate residential service providers, and plan and set priorities among all services providers, based upon available funds. County boards must also review proposals for the development of residential services and recommend providers therefor. A member, superintendent, administrative official, or case manager serving with a county board who also served as a trustee, officer, or employee of a residential service provider would have an inherent conflict of interest or divided loyalties such that his independent and objective judgment with regard to carrying out the decisions and responsibilities of the county board would be impaired.

In light of the foregoing, Divisions (D) and (E) of Section 102.03 prohibit a member of a county board of mental retardation and developmental disabilities and the superintendent, administrative officials, and case managers employed by the county board from serving, or using their authority or influence to secure a position, as a trustee, officer, or employee of a residential service provider.

You have also asked that your questions be considered in the situation where the county board and residential service provider have contracted. See R.C. 5126.05 (authorizing a county board to contract with an agency or organization to provide facilities, programs, and services). Section 5126.03 addresses the ability of county board members and employees to serve with contract agencies.

Division (B) of Section 5126.03 states:

A person may not serve as a member of a county board of mental retardation and developmental disabilities when either he or a member of his immediate family is a board member of a contract agency of that county board unless there is no conflict of interest. In no circumstance shall a member of a county board vote on any matter before the board concerning a contract agency of which he or a member of his immediate family is also a board member or an employee. All questions relating to the existence of a conflict of interest shall be submitted to the local prosecuting attorney and the Ohio ethics commission for resolution.

Division (B) of Section 5126.03 prohibits a county board member from serving as a board member of a contract agency of the county board, "unless there is no conflict of interest." The Ethics Commission is authorized to determine whether a conflict of interest exists under Chapter 102. or Sections 2921.42 or 2921.43 of the Revised Code. See Advisory Opinion No. 81-003.

As discussed above, a member of a county board would have a conflict of interest under R.C. 102.03(D) and (E) if he also served on the board of trustees of a residential service provider. Further, R.C. 2921.42(A)(4) prohibits a public official from having an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision with which he is connected. As concluded in Advisory Opinion No. 81-003, "a contract agency board member's fiduciary or pecuniary interest in the contract agency constitutes a conflict of interest with respect to his duties as a member of the [county] board," and therefore, R.C. 5126.03(B) prohibits a board member of a contract agency from serving on the county board. See also R.C. 102.03(A); R.C. 102.04(C).

Division (C) of Section 5126.03 states that:

No employee of an agency contracting with a county board of mental retardation and developmental disabilities or member of the immediate family of such an employee shall serve as a board member or an employee of the county board unless the county board passes a resolution establishing the eligibility of such person for appointment.

Thus, R.C. 5126.03(C) prohibits a member or employee of a county board from serving as an employee of a contract agency unless the county board passes a resolution establishing the eligibility of such person for appointment. However, regardless of whether a county board passes a resolution establishing the eligibility of an administrative official of a residential service provider to serve as a county board member, R.C. 102.03, as discussed above, otherwise prohibits such appointment.

Division (E) of Section 5126.03 states:

A county board of mental retardation and developmental disabilities shall not contract with an agency whose board includes . . . an employee of the same county board.

R.C. 5126.03(E), thus, prohibits an employee of a county board from serving on the board of a residential service provider where a contract exists between the county board and service provider. However, as discussed above, R.C. 102.03 prohibits the superintendent, administrative officials, and case managers, employed by a county board from serving on the board of a residential service provider, even where no contract exists between the two agencies.

This advisory opinion is based on the facts presented, and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.43, and 5126.03 of the Revised Code, and does not purport to interpret other laws or rules.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of a county board of mental retardation and developmental disabilities, and the superintendent, an administrative official, or case manager employed by the board, from serving, or using the authority or influence of his public office or employment to secure a position, as trustee, officer, or employee of a residential service provider, regardless of whether the county board has contracted with the residential service provider.


Merom Brachman, Chairman
Ohio Ethics Commission